INTELEK TIMUR SDN BHD

v.

FUTURE HERITAGE SDN BHD

FEDERAL COURT, KUALA LUMPUR
HAIDAR MOHD NOOR CJ (MALAYA)
SITI NORMA YAAKOB FCJ
RAHMAH HUSSAIN FCJ
[CIVIL APPEAL NO: 02-6-2003 (W)]
19 JANUARY 2004

ARBITRATION: *Award - Setting aside - Grounds for - Arbitrator misconducting himself or proceedings - Error of law on face of award - Whether award can be set aside if arbitrator made wrong inferences of fact from the evidence - Whether award can be set aside if arbitrator misconstrued contractual provisions contrary to principles of construction - Distinction between question of law referred and question of law emanating from facts - Power of High Court to interfere - Arbitration Act 1952, s. 24(2)*

The question of law that arose for decision before the Federal Court in the instant appeal was: whether the High Court may, in the exercise of its powers under s. 24(2) of the Arbitration Act 1952 ('the Act'), set aside an arbitrator's award for misconduct and/or error of law on the face of the award on the grounds that the arbitrator has: (a) made wrong inferences of fact from the evidence; and/or (b) misconstrued some relevant contractual provisions contrary to the legal principles of construction.

The dispute between the appellant/developer and the respondent/contractor had arisen from disagreements concerning payment for work done based on the progress certificates issued by the appellant's architect. The matter was then referred to arbitration proceedings at the conclusion of which the arbitrator handed down an award in favour of the respondent. On appeal, the High Court found the arbitrator to have misconducted himself and set aside his award. The Court of Appeal, however, reversed the High Court and restored the arbitrator's award.

Held (allowing the appeal)
Per Siti Norma Yaakob FCJ delivering the judgment of the court:

[1] An arbitrator's award is final, binding and conclusive, and may only be challenged in exceptional circumstances. Hence, the fact that an arbitrator has erred in drawing the wrong inferences of fact from the oral or documentary evidence is not in itself a sufficient reason to warrant his

award being set aside. "It would be contrary to all the established legal principles relating to arbitration if an award based upon the evidence presented were liable to be reopened on the suggestion that some of the evidence had been misapprehended and misunderstood". The power to set aside an award under s. 24(2) of the Act is only exercisable where the arbitrator has misconducted himself or where the award has been improperly procured. A "failure to analyse and appraise the evidence does not vitiate the award on the ground of misconduct". (pp 748 a-h, 749 a, f-h & 750 a-b)

[2] The arbitrator had misconstrued cl. 26(1)(a) of the employment contract between the parties. He did not direct his mind to the proviso on whether the notice of determination issued by respondent was 'given unreasonably or vexatiously'. This was an error in construction; it was apparent on the face of the record and could not be countenanced by the court. On this ground, the award could and should be set aside. (pp 750 f-h & 751 a-b)

[Part (a) of question answered in the negative and part (b) in the positive.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Persoalan undang-undang yang berbangkit untuk keputusan Mahkamah Persekutuan dalam rayuan semasa adalah: sama ada Mahkamah Tinggi boleh, dalam melaksanakan kuasa-kuasanya di bawah s. 24(2) Akta Timbangtara 1952 ('Akta'), mengetepikan award seorang penimbangtara atas alasan salahlaku dan/atau kekhilafan undang-undang pada permukaan award oleh kerana penimbangtara telah: (a) membuat inferens fakta yang salah dari keterangan-keterangan; dan/atau (b) menyalah tafsir beberapa peruntukan kontraktual yang relevan secara yang bertentangan dengan prinsip-prinsip pentafsiran.

Pertikaian antara perayu/pemaju dengan responden/kontraktor adalah berpunca dari perbalahan mereka berkaitan pembayaran untuk kerja yang dibuat yang didasarkan kepada sijil kemajuan yang dikeluarkan oleh arkitek perayu. Perkara tersebut kemudian dirujuk kepada prosiding timbangtara selepas mana penimbangtara memberikan award kepada responden. Semasa rayuan, Mahkamah Tinggi mendapati bahawa penimbangtara telah melakukan salahlaku dan dengan itu mengetepikan award. Mahkamah Rayuan bagaimanapun mengakas keputusan Mahkamah Tinggi dan mengekalkan award penimbangtara.

Diputuskan (membenarkan rayuan)
Oleh Siti Norma Yaakob HMP menyampaikan keputusan mahkamah:

[1] Sesuatu award penimbangtara adalah muktamad, mengikat dan konklusif, dan hanya boleh dicabar dalam keadaan-keadaan yang luarbiasa. Oleh yang demikian, fakta bahawa penimbangtara khilaf dalam membuat inferens fakta dari keterangan lisan dan dokumentari tidak mencukupi, atas alasan itu sahaja, untuk mengetepikan award yang dibuatnya. "Ianya adalah bertentangan dengan semua prinsip undang-undang sedia ada berkaitan dengan timbangtara jika sesuatu award, dengan berdasarkan kepada keterangan yang dikemukakan, boleh dibuka semula atas pandangan bahawa sebahagian dari keterangan-keterangan itu telah disalahtafsir atau disalahfaham". Kuasa untuk mengetepikan award di bawah s. 24(2) Akta hanya boleh dilaksanakan jika penimbangtara telah melakukan salah laku atau di mana award diperolehi dengan secara salah. Suatu "kegagalan untuk menganalisa dan menimbang keterangan tidak menjejaskan award tersebut atas alasan salah laku".

[2] Penimbangtara telah tersalah tafsir fasal 26(1)(a) perjanjian pekerjaan di antara pihak-pihak. Beliau tidak mengarahkan fikirannya kepada proviso sama ada notis penamatan yang dikeluarkan oleh responden telah "diberi secara tidak munasabah atau pun menyusahkan". Ini adalah satu kekhilafan tafsiran; ianya kelihatan pada permukaan rekod dan tidak boleh disahkan oleh mahkamah. Atas alasan ini award tersebut mungkin boleh dan harus diketepikan.

Bahagian (a) soalan dijawab secara negatif sementara bahagian (b) secara positif.]

Case(s) referred to:
Ganda Edible Oils Sdn Bhd v. Transgrain BV [1987] 2 CLJ 394; [1987] CLJ (Rep) 95 SC ***(refd)***
Sharikat Pemborong Pertanian & Perumahan v. Federal Land Development Authority [1971] 2 MLJ 210 ***(foll)***

Legislation referred to:
Arbitration Act 1952, s. 24(2)

Other source(s) referred to:
Halsbury's Laws of England, 4th edn, p 334, para 623

For the appellant - Ramdas Tikamdas (Ernest Azad); M/s Ernest Azad & Assoc
For the respondent - Suria Kumar; M/s Suria Kumar & Co

[Appeal from Court of Appeal, Civil Appeal No: W-02-202-2001]

Reported by Gan Peng Chiang

JUDGMENT

Siti Norma Yaakob FCJ:

The question that is posed to us in this appeal comes in two parts and it reads as follows.

> Whether pursuant to section 24(2) of the Arbitration Act 1952 ("the Act") the High Court can exercise its powers to set aside an arbitrator's award for misconduct and/or error of law on the face of the award on the grounds that:
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> (i) the arbitrator is held to have made wrong inferences of fact from the evidence including the documents incorporated in the award, and/or
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> (ii) the arbitrator is held to have erroneously construed the provisions of a contract on principles of construction which the law does not countenance.

This question arose from proceedings referred by both parties to an arbitrator, Mr. Jerry Sum Phoon Mun ("the arbitrator") pursuant to the terms and conditions of a contract of employment which both parties had entered into. By a letter of award dated 16 September 1996, issued by the appellant's architect, the appellant, a developer, appointed the respondent to undertake the development and completion of a low cost housing project in Hulu Langat, Selangor. The letter of award incorporated The Pertubuhan Akitek Malaysia (PAM) Standard Form Agreement, which *inter alia*, contains provisions referring disputes or differences between the parties to arbitration.

In accordance with the contract of employment, the appellant paid the respondent on the progress certificates issued by the appellant's architect based on the works done by the respondent. It is in respect of payments of some of these certificates that the parties came to disagreement.

There is no dispute over Certificates No. l to 5 as the appellant honoured those within the stipulated 60 days from the date of each claim and the amounts due were paid directly to the respondent.

Then in early 1997, the parties agreed that all future progress claims were to be settled by a factoring agreement entered into by the respondent with Showa Factoring (Malaysia) Sdn. Bhd. ("Showa") whereby the respondent would submit its invoices (based on the Certificates of Payment) to Showa. The invoices would be factored and Showa would pay the respondent 80% of the invoiced amounts. The balance of 20% would be released by Showa less interest charges, after Showa received the invoiced sums from the appellant.

Based on the factoring arrangement the respondent was paid all sums due on Certificates of Payment Nos. 6, 7, 8 and 11 although it experienced some delays. It received the 80% sums due from Showa as well as the 20% less interest charges after the appellant had paid Showa the factored invoiced sums. For Certificate of Payment No. 12 payment of the sum due was made directly to the respondent and not under the terms of the factoring agreement. However the respondent was not so lucky with Certificates of Payment Nos. 9 and 10 as the respondent only received 80% of all sums claimed but not the balance of the 20% as the appellant had failed to pay the factored invoiced sums at the material time to Showa due to disputes arising between the appellant and Showa.

It was following the non-receipt of the full sums due on Certificates of Payment Nos. 9 and 10 that the respondent decided to determine the contract by issuing a notice dated 10 December 1997, pursuant to cl. 26(1)(a) of the contract and by another letter dated 19 December 1997, notified the appellant that it no longer regarded itself as being employed as the appellant's contractor in respect of the housing development.

It was following the issuance of the notice of determination dated 19 December 1997, that the respondent stopped all works at the site. This prompted the appellant's architect to issue a similar notice dated 24 December 1997 pursuant to cl. 25(1)(a) and/or (b) of the contract on the ground that the respondent had without reasonable cause defaulted in completing the project.

It was under those circumstances that the President of PAM appointed the arbitrator in May of 1998 to look into the appellant's claims for losses and damages against the respondent and the respondent's counterclaim for the same remedies against the appellant.

In his award dated 16 June 2000, the arbitrator dismissed the appellant's claims and allowed the respondent's counterclaim and assessed its losses and damages at RM2,137,549.70 and ordered that such damages be settled by the appellant within 14 days from the date the award is taken by either party.

Dissatisfied, the appellant challenged the arbitrator's award in the High Court on the grounds that the arbitrator was guilty of misconduct. Faiza Tamby Chik J, agreed with the appellant and set aside the award on the ground that there had been a miscarriage of justice.

The respondent took the matter further to the Court of Appeal that found for the respondent and restored the award of the arbitrator. It is against this finding that leave was granted by this court to determine the question which I had referred to at the beginning of this judgment.

The law regarding the effect of an arbitration's award is well settled in that the award is final, binding and conclusive and can only be challenged in exceptional circumstances. As such if an arbitrator had erred by drawing wrong inferences of fact from the evidence before him be it oral or documentary that in itself is not sufficient to warrant the setting aside of his award. "It would be contrary to all the established legal principles relating to arbitration if an award based upon the evidence presented were liable to be reopened on the suggestion that some of the evidence had been "misapprehended and misunderstood" per Raja Azlan Shah J (as he then was) in *Sharikat Pemborong Pertanian & Perumahan v. Federal Land Development Authority* [1971] 2 MLJ 210.

The power to set aside an award under s. 24(2) of the Act can only be exercised where the arbitrator has misconducted himself or the award has been improperly procured. Acts of misconduct have been defined and explored in *Sharikat Pemborong* in the following manner.

> In the law of arbitration misconduct is used in its technical sense as denoting irregularity and not moral turpitude. It includes failure to perform the essential duties which are cast on an arbitrator as such, for instance, failure to observe the rules of natural justice, appearance of bias or partiality. It also includes any irregularity of action which is not consonant with the general principles of equity and good conscience. These illustrations are not meant to be exhaustive. But failure to analyse and appraise the evidence does not vitiate the award on the ground of misconduct. It is only when the evidence is material, relevant and had gone to affect the award that the award will be vitiated.

As to the determination of whether the award has been improperly procured, this must depend on the issues or the questions that have been referred to the arbitrator. It is from these issues or questions that the arbitrator has to make findings of fact on the evidence adduced before him and more often than not, questions of law arise from his findings of fact. It is under these circumstances that Raja Azlan Shah J in *Sharikat Pemborong* sounded a warning that reads as follows.

> It is essential to keep the distinction between a case where a dispute is referred to an arbitrator in the decision of which a question of law becomes material from the case in which a specific question of law has been referred to him. The wealth of authorities make a clear distinction between the two classes of cases and they decide that in the former case the court can interfere if and when any error appears on the face of the award but in the latter case no such interference is possible upon the ground that the decision upon the question of law is an erroneous one.

In this appeal, the arbitrator made a number of findings as can be seen from his award but of particular interest is the question of whether the respondent had lawfully determined its own employment pursuant to cl. 26(1)(a) of the contract. *Per se* this is a question of law but it must be remembered that this was not the only issue that was referred to him. There were other issues that were raised before him and they include:

(1) whether the appellant handed over possession of the entire site to the respondent on 2 September 1996.

(2) whether the parties negotiated and agreed to a revised date of completion for each block constructed.

(3) whether the period for honouring interim payments was 60 days from the date of the respondent's progress payment claims.

(4) whether the appellant had defaulted in honouring Certificate of Payment Nos. 1 to 5.

(5) whether the same situation arose with regard to Certificate of Payment Nos. 6 to 11.

(6) what was the factual situation with regard to Certificate of Payment No. 12.

(7) whether the appellant's determination of the respondent's employment was proper and lawful.

(8) whether the respondent was entitled to be compensated for all losses arising from the lawful determination of its employment.

In making the various findings of fact as stated in his award, the arbitrator had also to consider whether the respondent's contract of employment had been legally determined under cl. 26(1)(a) as fault or liability had to be established to determine whose claims can succeed. It must be remembered that in this case both parties were pointing a finger at each other with each alleging that the other had breached the contract. Under these circumstances I consider that the matter for arbitration falls within the first category of cases which had been distinguished by *Syarikat Pemborong* namely that when deciding the dispute that had been referred to him the arbitrator had also to determine a question of law which had become material in his decision to the dispute referred. That said, interference is possible if an error appears on the face of the award. In *Ganda Edible Oils Sdn. Bhd. v. Transgrain B.V.* [1987] 2 CLJ 394; [1987] CLJ (Rep) 95, the Supreme Court in laying down the principles when an

arbitrator's award can be set aside had, *inter alia*, adopted those that have been identified in *Halsbury's Laws of England*, 4th edn, p. 334, para. 623 to be as follows.

> ... and where the question referred for arbitration is a question of construction, which is, generally speaking, a question of law, the arbitrator's decision cannot be set aside only because the court would itself have come to a different conclusion; but if it appears on the face of the award that the arbitrator has proceeded illegally, as, for instance, by deciding on evidence which was not admissible, or on principles of construction which the law does not countenance, there is error in law which may be ground for setting aside the award.

Turning now to the contract in this appeal, the provisions of cl. 26(1)(a) reads as follows.

> Without prejudice to any other rights and remedies which the Contractor may possess, if
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> (a) The Employer does not pay to the Contractor the amount due on any certificate within the Period from Honouring Certificates named in the Appendix to these Conditions and continues such default for seven days after receipt by registered post or recorded delivery of a notice from the Contractor stating that notice of determination under this Condition will be served if payment is not made within seven days from receipt thereof; or
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> (b) ...
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> (c) ...
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> (d) ...
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> then the Contractor may thereupon by notice by registered post or recorded delivery to the Employer or Architect forthwith determine the employment of the Contractor under this Contract; **provided that such notice shall not be given unreasonably or vexatiously**. (emphasis added).

In dealing with this particular clause in his award, the arbitrator was more concerned with the issue as to whether the respondent had complied with the procedure of serving the notice of determination as laid down in the contract. He did not direct his mind to the proviso as to whether the notice had been issued unreasonably or vexatiously. He had not subjected himself to the crucial question as to the respondent's conduct in sending the notice and in so doing had, on principles of construction, erroneously construed the provisions of cl. 26(1)(a). It is in this respect that the Court of Appeal fell into error in assuming that the arbitrator had considered the whole clause in its entirety. I

say that this failure to analyse and appraise the effect of cl. 26(1)(a) in its entirety, as is apparent on the face of the record, is one instance of conduct which the law does not countenance and it is this error of law that empowers me to have the award set aside, which I now do.

For the reasons appearing in this judgment I answer the first part of the question posed in this appeal in the negative and the second part in the positive. Accordingly this appeal is allowed and since the appellant has succeeded in part, it is only entitled to half its costs as well as a refund of the costs deposited in this appeal.

In this respect, my brother Haidar Mohd. Noor CJM, and my sister, Rahmah Hussain FCJ, who have had sight of this judgment agree that for the reasons given therein such orders be made accordingly.